

(2)

Supreme Court, U.S.
FILED

JUL 18 1988

JOSEPH E. SPANIOLO, JR.
CLERK

No. 87-2107

IN THE
Supreme Court of the United States
October Term, 1987

LAWRENCE J. LEWIS, M.D.,
a contributor to
ANCLOTE PSYCHIATRIC CENTER, INC.,
a Florida Not For Profit Corporation,
Petitioner,

v.

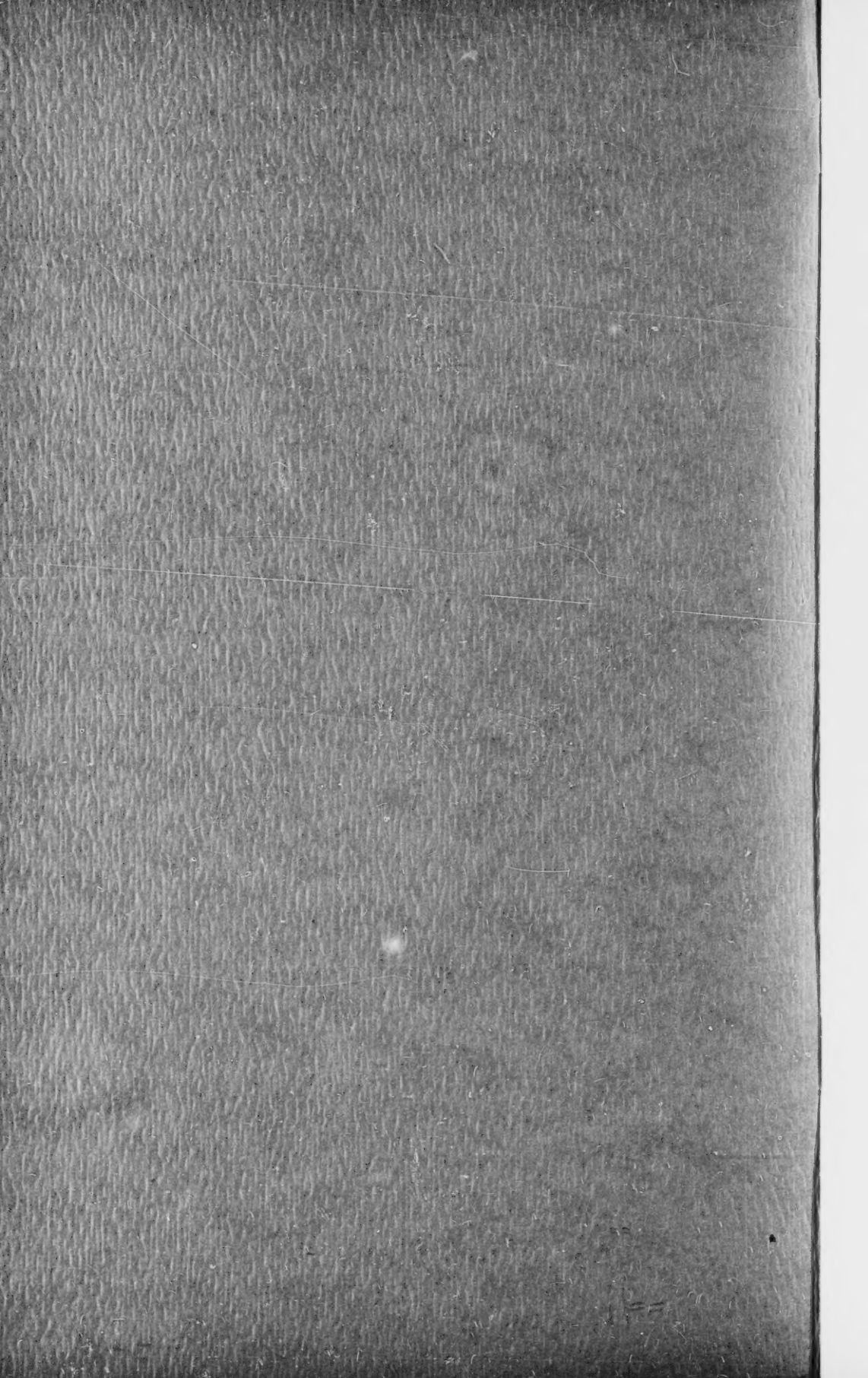
ANCLOTE MANOR HOSPITAL, INC.,
a Florida For Profit Corporation;
WALTER H. WELLBORN, JR., M.D.;
ARTHUR R. LAUTZ; MANUAL VALLES, JR.;
ROBERT L. CROMWELL; THOMAS C. FARRINGTON, JR.;
THOMAS E. McLEAN; JAMES C. TREZEVANT, JR.;
SERGE BONANNI; LORRAINE HIBBS;
ALBERT C. JASLOW, M.D.;
ROBERT J. VAN de WETERING, M.D.;
WALTER L. COOPER; JAMES D. O'DONNELL; and
JIM SMITH, Attorney General of the State of Florida,
Respondents.

**OPPOSITION TO PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

BRIEF OF RESPONDENTS

John R. Bush
Bush Ross Gardner Warren & Rudy, P.A.
220 South Franklin Street
Tampa, Florida 33601
(813) 224-9255
Counsel for Respondents

July 15th, 1988



QUESTION PRESENTED

Should this court, in its discretion, review on writ of certiorari the decision of the court in *Lewis v. Anclothe Manor Hospital*, 837 F.2d 1093 (11th Cir. 1988) (Pet.'s App. at 13a-14a)¹ which affirmed the decision of the United States District Court for the Middle District of Florida, *Lewis v. Anclothe Manor Hospital, Inc.*, Civil Action No. 86-654-CIV-T-13(c), July 7, 1987 (Pet.'s App. at 4a-12a)?

Stated otherwise, has the United States Court of Appeals for the Eleventh Circuit rendered a decision in conflict with a decision of the Court or of another federal circuit court of appeals by holding that, in his federal RICO claim, the petitioner does not have standing to sue the directors of a Florida corporation and its attorney, under circumstances wherein the petitioner is neither a shareholder, member nor director of the corporation, and has not been injured in his business or property?

¹References to Petitioner's Appendix are so indicated.

LIST OF ALL PARTIES

1. The petitioner is Lawrence J. Lewis, M.D., who was an employee of Anclote Psychiatric Center, Inc., a Florida not for profit corporation (APC).

2. Respondent, Anclote Manor Hospital, Inc. (AMH), is a Florida corporation.

3. Respondents, Walter H. Wellborn, M.D.; Arthur R. Lautz; Manuel Valles, Jr.; Robert L. Cromwell; Thomas C. Farrington, Jr.; Thomas E. McLean; James C. Trezevant, Jr.; Serge Bonanni; Lorraine Hibbs; Albert C. Jaslow, M.D.; Robert J. Van de Wetering, M.D.; and Walter L. Cooper are the members of the board of APC. They are also the stockholders of AMH.

4. Respondent James D. O'Donnell is a practicing attorney, licensed by Florida.

5. Respondent, Jim Smith, was, at the time of the filing of this action in the district court, Attorney General of Florida.

TABLE OF CONTENTS

	<i>Page</i>
QUESTION PRESENTED	i
LIST OF ALL PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES CITED	iv
DECISIONS BELOW	1
JURISDICTION	2
APPLICABLE STATUTES	2
STATEMENT OF THE CASE	2
ARGUMENT	4
CONCLUSION	8
CERTIFICATE OF SERVICE	9
APPENDIX	A-1

TABLE OF AUTHORITIES CITED

I. CASES:	Page
<i>American National Bank & Trust Co. v. Haroco</i> , 473 U.S. 606 (1985)	5
<i>Flast v. Cohen</i> , 392 U.S. 83 (1968)	5
<i>In re Industrial Gas Antitrust Litigation</i> , 681 F.2d 514 (7th Cir. 1982), cert denied 460 U.S. 1016 (1983)	5
<i>O'Donnell v. Kusper</i> , 602 F. Supp. 619 (N.D. Ill. 1985)	5
<i>Ragar v. J. T. Raney & Sons</i> , 388 F. Supp. 1184 (E.D. Ark.) <i>aff'd</i> 521 F.2d 795 (8th Cir. 1975)	5
<i>Sedima, S.P.R.L. v. Imrex Co., Inc.</i> , 473 U.S. 479 (1985)	5
<i>Texas & P. Ry. Co. v. Volk</i> , 151 U.S. 73 (1894)	8
<i>Wagner Electric Mfg. Co. v. Lyndon</i> , 262 U.S. 226 (1923)	8
<i>Warren v. Manufacturers Nat'l Bank of Detroit</i> , 759 F.2d 542 (6th Cir. 1985)	5
 II. STATUTES:	
1. Federal:	
15 U.S.C. §15(a)	5
18 U.S.C. §1962	5
18 U.S.C. §1964(c)	5, 8
26 U.S.C. §501(c)(3)	5, 6, 7
26 U.S.C. §6501(a)	3
 2. State:	
Fla. Stat., §607.147(1)(1985)	3, A-1
Fla. Stat., §617.01(2)(1985)	7
Fla. Stat., §617.021(9), (11)(1987)	7, A-1
Fla. Stat., §617.09(1987)	4, 7, A-1
 III. RULES:	
Sup. Ct. Rule 17, 28 U.S.C.	4, 7
Sup. Ct. Rule 49.2, 28 U.S.C.	8
Rule 23.1, Fed.R.Civ.P., 28 U.S.C.	3

DECISIONS BELOW

The decision of the United States District Court for the Middle District of Florida is that Lewis does not have standing to sue. Accordingly, the case was DISMISSED on jurisdictional grounds without a determination on the merits of the substantive claims asserted in the complaint. (Pet.'s App. 4a-12a). This order of dismissal and final judgment was affirmed, *Lewis v. Anclote Manor Hospital, Inc.*, 837 F.2d 1093 (11th Cir. 1988) (Pet.'s App. 13a-14a).

JURISDICTION

Petitioner seeks jurisdiction pursuant to 28 U.S.C. §1254(1).

APPLICABLE STATUTE

The Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. No. 91-452, Title IX, 84 Stat. 941, codified as amended 18 U.S.C. §§1961-1968. (Pet.'s App. 20a-31a).

STATEMENT OF THE CASE

Respondents are unable to accept the hyperbolic recitation indulged in by petitioner's attorney. We limit this statement of the case to the facts which are set out in the written opinion of the district court judge. (Pet.'s App. at 4a-12a):

Lewis filed his complaint in the district court in this non-diversity action, seeking federal jurisdiction under RICO. He alleged that the respondents, APC's 12 board members and their attorney, committed fraud upon APC by selling its assets, in May 1983, at less than fair market value to AMH, which was controlled by the 12 respondent directors. He also asserted that, subsequently, AMH resold the assets to American Medical International, a corporation (AMI), for a huge profit.

Lewis alleged that he "is bringing this derivative action on behalf of [APC], and has standing to do so." He maintained that he was not pursuing the action in his own right, but was

acting as a representative of APC. He based his standing upon his charitable contributions to APC and upon his employment as a medical director and director of admissions of APC.

The contributions upon which Lewis bases his standing were made in 1979 and consisted of \$100 in cash plus an automobile for which he had paid \$200.² The district court judge noted that the Internal Revenue Service had not disallowed Lewis' charitable deductions based upon those contributions within the three year statute of limitations set forth in The Internal Revenue Code of 1954, §6501(a), 26 U.S.C. §6501(a).

The district court also noted that Lewis has otherwise been unable to calculate any damages that he has personally suffered from the actions of APC's board of directors. "In other words, the plaintiff has failed to show a 'personal stake' in this action." (district court opinion, Pet.'s App. at 8a).

Lewis asserted that his position as medical director and director of admissions of APC gives him a special interest in the case. The district court disagreed. "However, Lewis was only an employee of APC and has never been on the board of directors or a member of APC, nor has he ever owned stock in APC." (*Id.* at 8a-9a). The district court cited both federal and Florida law for the proposition that, in order to have standing in a derivative action, the plaintiff must either be a shareholder or member of the corporation at the time of the transaction of which he complains or that such share or membership thereafter be devolved upon him by operation of law. Rule 23.1, Fed.R. Civ.P;

²In Petitioner's argument that he has a "personal stake" in this matter, his attorney misstates or overstates the facts. Thus, although the record demonstrated to the district court judge that Lewis had contributed \$100 and an old automobile, petitioner's attorney writes in his petition at pp. 27-28 that "Lewis made a contribution which bought something the Charity required in order to operate, e.g. a hospital bed. Subsequently, that same hospital bed was sold to AMI as part of AMH. Lewis' contribution, fraudulently appropriated by the Board, serves as the logical nexus between his status asserted (a Contributor) and the claim (the funds from his contribution having been misappropriated by the Directors)." There is no record evidence that \$100 and an old automobile "bought a hospital bed" or that Lewis' "contribution" was "fraudulently appropriated by the Board." It would be logical to assume that APC had spent the \$100 in operations, and had worn out the old car prior to the May, 1983 transaction.

Fla. Stat. §607.147(1), (1985). The court rejected Lewis' argument that such requirements are inapplicable to him, particularly noting that Lewis alleged in paragraph 9 of his complaint that he "is bringing this derivative action on behalf of [APC]" (district court opinion, Pet.'s App. at 10a).

Finally, the district court judge noted Lewis' argument that "to deny him standing 'would create the absurd result . . . that there would be no legal mechanism to bring a representative suit on behalf of the Charity [and that] [a]s a matter of public policy, some individual plaintiff must have the right to protect the interests of a charity if those legally charged to do so fall short of their responsibilities.'" (*Id.* at 10a). Responding to Lewis' argument, the court states that "a mechanism for such relief has been provided by Florida law. *See, Fla. Stat.* §617.09 [Resp.'s App.]; *see also*, 9 Fla.Jur.2d *Charities* §18 (Attorney General is proper party and private parties generally have no right to maintain suit other than as relators to Attorney General)." (Pet.'s App. at 11a).

The district court concluded by observing that petitioner's "concern that the interests of the charity [would] not be protected are unfounded." (*Id.* at 11a). In his response to the respondents' motion for summary judgment, the Florida Attorney General stated that he is investigating and evaluating the evidence and is authorized under both common law and statutory law to investigate and, if necessary, litigate such matters as are contained in Lewis' complaint. Accordingly, the district court dismissed Lewis' complaint. (*Id.* at 11a).

ARGUMENTS

Petitioner Lewis fails to demonstrate that the Court should exercise its discretion to review. He has failed to demonstrate any "special and important reasons therefor." Rule 17, Sup. Ct. Rules, 28 U.S.C.

More specifically, petitioner has not shown that the decision which the federal court of appeals has rendered is in conflict with

the decision of another federal circuit court of appeals on the same matter. He has not demonstrated that the Eleventh Circuit in its decision reported at 837 F.d 1093 (11th Cir. 1988) (affirming without opinion the district court decision), has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure, as to call for an exercise of the Court's power of supervision. Finally, Lewis has failed to demonstrate that the Eleventh Circuit's decision involved an important question of federal law which has not been, but should be, settled by the Court, or that it decided a federal question in a way which conflicted with applicable decisions of the Court.

In observing that Lewis had failed to show a "personal stake" in this action, the district court judge cited *Flast v. Cohen*, 392 U.S. 83, 99 (1968), which holds that the court must focus on the person whose standing is challenged, not whether the issue is justiciable. (Pet.'s App. at 8a). The district judge also cited 18 U.S.C. §1964(c) which limits a person's civil RICO action to one who is "injured in his business or property."³

Only a plaintiff who has been injured in his business or property by reason of a violation of §1962 is entitled to sue. 18 U.S.C. §1964(c); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985); n.1; *American National Bank & Trust Co. v. Haroco*, 473 U.S. 606 (1985). Moreover, employees do not have standing to sue a corporation under RICO. *Warren v. Manufacturers Nat'l Bank of Detroit*, 759 F.2d 542 (6th Cir. 1985). Plaintiff was an employee of APC. (Pet.'s App. at 8a-9a). See also, *O'Donnell v. Kusper*, 602 F.Supp. 619 (N.D. Ill. 1985) (holding that the court did not have jurisdiction to hear a RICO complaint by a citizen and resident taxpayer, because he did not have a "personal stake"

³Assuming *arguendo* that the respondents converted Lewis' contributions consisting of \$100 and an old car worth \$200 in 1979, such does not demonstrate a §1964(c) "injury" because Lewis' previous contributions would not constitute his "business or property" during 1983 when the subject transaction occurred. After making his tax deductible contributions during 1979, Lewis did not have a business or property interest to protect by suing respondents in 1986. The district court judge implied just that in his opinion. (Pet.'s App. at 8a).

to sue on behalf of the county).⁴

Additionally, Lewis fails to demonstrate a matter of federal concern. Presumably, his attorney would argue that the federal judiciary should be concerned because APC has received exemption from federal taxation since the late 1950's. However, the §501(c)(3) exemption from federal taxes [26 U.S.C. §501c-3], which is granted to corporations which devote their income to eleemosynary purposes is a matter for administration by the Internal Revenue Service.⁵

Lewis' constant reference to APC as a "charity" is a gross exaggeration and, we would suggest, constitutes his lawyer's effort to somehow convince the Court that it should exercise its review jurisdiction in order to correct what he paints as a "local wrong." Respondents, particularly at this stage of the process, decline to engage in a merits discussion. Suffice it to say that Lewis does not include in his petition for writ of certiorari a copy of the articles of incorporation of APC, or any other documentation

⁴The antitrust cases are pertinent because §4 of the Clayton Act [15 U.S.C. §15(a)] is almost identical with RICO's §1964(c). In *Ragar v. J. T. Raney & Sons*, 388 F.Supp. 1184 (E.D. Ark.), *aff'd* 521 F.2d 795 (8th Cir. 1975), and in *In re Industrial Gas Antitrust Litigation*, 681 F.2d 514 (7th Cir. 1982), the circuit courts of appeal affirmed holdings that the plaintiffs could not maintain actions because they were not injured in their business or property.

⁵Section 501(a) provides that an organization described in subsection (c) shall be exempt from taxation. Subsection (c) provides:

List of Exempt Organizations. - The following organizations are referred to in subsection (a):

• • •

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Quite obviously, if a corporation does not qualify for tax exemption, the IRS has jurisdiction to disallow tax exemption.

which would in any way suggest that APC is a "charity," as that term is defined under state law. In addition, Lewis is unable to demonstrate that the property which APC sold to AMH in May 1983 was subject to any public or other trust, or that the property had originally been donated, or that it had been accumulated on the strength of public funding.

This matter is strictly of state concern, and does not implicate any federal interest. For example, *Fla. Stat.* §§ 617.021 (9), (11) (1987) (Resp.'s App.), provide that the corporate powers of a not for profit corporation (such as APC), include taking by gift or otherwise acquiring real or personal property, and selling all or any part of its property and assets. In addition, the Florida Not For Profit Corporation Law, Chapter 617, *Fla. Stat.* (1987) does not preclude a not for profit corporation's directors from purchasing its assets. Lewis suggests in his brief that APC's income "inured to the benefit of the respondent directors." (Pet. at 37).⁶ However, in the event that APC, a not for profit corporation, was utilized in a fashion contrary to its charter, a Florida statute gives the Florida Attorney General standing or authority to file suit in order to revoke the corporation's charter. *Fla. Stat.* §617.09 (1987). (Resp.'s App.). Very simply, this is a matter of state concern with no federal implications whatsoever.

Dr. Lewis' petition for certiorari is patently frivolous. It consists of 63 pages of pleas, inapposite argument, references to inapplicable law review articles, misstatements of fact, and unfounded accusations against honorable people. His lawyer, Mr. Buchman, has not even addressed the Court's Rule 17 criteria.

⁶Lewis actually states that "[t]he Articles of Incorporation of the Charity states [sic] that 'no income or assets shall inure to the benefit of any private individual or shareholder.' " (Pet. at 37). In the first place, Lewis' attorney has misquoted the articles which provide that "All of the assets and earnings of the corporation shall be used exclusively for the purposes hereinabove set out, including the payment of expenses incidental thereto; and no part of the net earnings of the corporation shall inure to the benefit of any private shareholder or individual. No substantial part of the activities of the corporation shall consist of carrying on propaganda or otherwise attempting to influence legislation; nor shall the corporation participate in or intervene in (by the publishing or distributing of local statements or otherwise) any political campaign on behalf of any candidate for public office." Secondly, it is readily apparent that the articles of incorporation merely track §501(c)(3), Internal Revenue Code of 1954, 26 U.S.C. §501(c)(3), for the purpose of maintaining a tax exemption.

Finally, RICO requires a special showing for standing - the claimant must demonstrate that he was "injured in his business or property." (district court opinion, Pet.'s App. at 8a). One cannot really believe that Mr. Buchman is so fatuous as to believe that the Court would overlook constitutional concepts, and rewrite §1964(c) so as to provide that Lewis would enjoy an exemption from RICO's threshold jurisdictional requirement.

It is beyond belief that Mr. Buchman would file his petition for certiorari knowing that he has no basis to suggest that the district court misunderstood RICO's jurisdictional requirement. There is no basis for such belief.

Lewis and his lawyer had no business filing "racketeering" allegations against respondents, and Mr. Buchman had no basis for filing this petition. Accordingly, respondents respectfully move for entry of judgment of damages against Lewis and Buchman. Rule 49.2. Sup.Ct.Rule, 28 U.S.C.; *see, Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226 (1923); *Texas & P.Ry.Co. v. Volk*, 151 U.S. 73 (1894).

CONCLUSION

The petition for writ of certiorari should be denied, with an award of damages to respondents because the petition is frivolous. In addition, respondents seek the costs of responding to the petition, including printing and postage. With regard to damages, including fees, we suggest that the Court remand to the district court for the taking of testimony and evidence, and award based thereon.

Respectfully submitted,
 John R. Bush
 Bush, Ross, Gardner,
 Warren and Rudy, P.A.
 220 South Franklin Street
 Tampa, Florida 33601
 (813) 224-9255
 Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused 40 copies of this brief opposition to be deposited in the United States Mail, addressed to the Clerk of the United States Supreme Court, and three true copies of the foregoing were furnished by U.S. Mail delivery to J. Miles Buchman, attorney for petitioner, 101 E. Kennedy Bld., Suite 1450, P. O. Box 454, Tampa, FL 33601; on this 15th day of July, 1988.

BUSH ROSS GARDNER WARREN
& RUDY, P.A.
220 South Franklin Street
Tampa, FL 33602
(813) 224-9255
Attorneys for Respondents

By: /s/ John R. Bush
John R. Bush

Subscribed to and sworn to before me this 15th day of July, 1988.

/s/ Billie L. Twell
Notary Public, State of Florida at Large

My Commission Expires: June 9th, 1989

APPENDIX

PERTINENT LANGUAGE OF CITED FLORIDA STATUTES

§607.147(1) *Fla. Stat. (1985)*: It must be made to appear that the plaintiff was a shareholder or a holder of voting trust certificates at the time of the transaction of which he complains or that his shares or voting trust certificates thereafter devolved upon him by operation of law from a person who was a shareholder or holder of voting trust certificates at such time.

§617.01(2) *Fla. Stat. (1985)*. As used in this chapter, "corporation not for profit" means a corporation no part of the income of which is distributable to its members, directors, or officers.

§§617.021(9), (11) *Fla. Stat. (1987)*: Every corporation not for profit organized hereunder, unless otherwise provided in its articles of incorporation or by law, shall have power to:

• • •

(9) Purchase, take, receive, lease, take by gift, devise, or bequest, or otherwise acquire, own, hold, improve, use or otherwise deal in and with real or personal property, or any interest therein, wherever situated.

• • •

(11) Sell, convey, mortgage, pledge, lease, exchange, transfer, or otherwise dispose of all or any part of its property and assets.

§617.09 *Fla. Stat. (1987)*: In the event any member or citizen shall complain to the Department of Legal Affairs that any corporation organized under this chapter was organized or is being used as a cover to evade any of the laws against crime, or for purposes inconsistent with those stated in its articles of incorporation or charter, and shall submit prima facie evidence to sustain such charge, together with sufficient money to cover court costs and expenses, the said department forthwith shall institute and in due course prosecute to final judgment such legal or equitable proceedings as may be considered advisable either to revoke the articles of incorporation or charter or prevent its improper use.